

[NOTE: Each PPA request is evaluated on its own merits. The full text of recent prospective purchaser agreements is provided for information purposes only. The Model Prospective Purchaser Agreement will serve as a starting point for structuring future agreements.]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN THE MATTER OF:

BOYLES GALVANIZING SITE, Philadelphia, Pennsylvania

**New Kensington Community
Development Corporation**

Settling Respondent

**Under Authority of the Comprehensive
Environmental Response, Compensation,
and Liability Act of 1980, as amended,
42 U.S.C. § 9601, et seq.**

AGREEMENT AND COVENANT NOT TO SUE

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") and the New Kensington Community Development Corporation (collectively the "Parties").

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. and the authority of the Attorney General of the United States to compromise and settle claims of the

1 United States.

2
3 Settling Respondent New Kensington Community Development Corporation is a non-profit
4 corporation established for the purpose of assisting with the redevelopment of the New Kensington
5 area of Philadelphia County, Pennsylvania. The Boyles Galvanizing Site is located at 2501-2527
6 East Cumberland Street, City of Philadelphia, Philadelphia County, Pennsylvania

7 The Parties agree to undertake all actions required by the terms and conditions of this
8 Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and
9 limitations contained in Sections VII, VIII, IX, and X, the potential liability of the Settling
10 Respondent for the Existing Contamination at the Property which would otherwise result from
11 Settling Respondent becoming the owner of the property.

12 The Parties agree that the Settling Respondent's entry into this Agreement, and the actions
13 undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an
14 admission of any liability by the Settling Respondent.

15 The resolution of this potential liability, in exchange for provision by the Settling Respondent
16 to EPA of a substantial benefit, is in the public interest.

17
18 **II. DEFINITIONS**

19 Unless otherwise expressly provided herein, terms used in this Agreement which are defined
20 in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them
21 in CERCLA or in such regulations, including any amendments thereto.

1 1. "EPA" shall mean the United States Environmental Protection Agency and any successor
2 departments or agencies of the United States.

3 2. "Existing Contamination" shall mean any hazardous substances, pollutants or
4 contaminants, present or existing on or under the Site as of the effective date of this Agreement.

5 3. "Parties" shall mean EPA and the Settling Respondent.

6 4. "Property" shall mean that portion of the Site which is described in Exhibit 1 of this
7 Agreement.

8 5. "Settling Respondent" shall mean the New Kensington Community Development
9 Corporation.

10 6. "Site" shall mean the Boyles Galvanizing Site located at 2501-2527 East Cumberland
11 Street in Philadelphia County, Pennsylvania and depicted generally on the map attached as Exhibit

12 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants
13 or contaminants, have come to be located.

14 7. "United States" shall mean the United States of America, its departments, agencies, and
15 instrumentalities.

16
17 **III. STATEMENT OF FACTS**

18 8. (a) From approximately 1969 through 1980, the Boyles Galvanizing Site was owned and
19 operated by Boyles Galvanizing Company, Inc. ("Boyles"), which used the property for its zinc
20 galvanizing operations. The primary hazardous substance used in this process was metallic zinc. In
21 1980, Boyles closed the plant and decommissioned the operational portions of the facility. In 1981,

1 Boyles sold the property to Deborah Taintor, who used the property to store amusement park
2 equipment in the building that then still existed on the Site. In 1986, the Site was again sold, this time
3 to the present owner, Gustav Propper. In 1989, the structures on the Site were demolished. Mr.
4 Propper allowed the demolition to proceed despite his knowledge that the kettles used in the
5 galvanizing operations were still present inside the building. The Site is currently occupied by
6 Greensgrow, Inc., which conducts hydroponic lettuce farming activities consisting primarily of
7 growing lettuce in plastic troughs above the ground.

8 (b) In 1993, the EPA performed sampling at the Site which detected elevated levels of lead
9 and zinc in subsurface soils; however, it was determined that the results of the surface samples did
10 not warrant emergency action. In July 1994, EPA received a report that Mr. Propper was allowing
11 excavation activities to occur on the Site. EPA investigated and found heavy equipment being used
12 to clear and grub the Site. As a result, contaminated subsurface soils were being deposited on the
13 surface, creating a potential exposure pathway. EPA performed additional sampling which detected
14 elevated levels of lead and zinc sufficient to warrant a determination that there existed a threat to
15 public health, welfare and/or the environment due to the threat of release of hazardous substances
16 from the Site.

17 (c) In 1994, EPA conducted removal activities at the Site. During these activities, EPA
18 identified zinc process residue in the former galvanizing area. EPA segregated the contaminated soils
19 into four piles, two lead contaminated piles and two zinc contaminated piles. EPA then entered into
20 an Administrative Order on Consent with Boyles to dispose of the two piles of zinc contaminated soil.
21 Boyles successfully fulfilled its obligations under the AOC. All removal activities were completed

1 in 1995. As of March 30, 1997, EPA has incurred response costs in excess of \$ 480,070.35 in
2 connection with response actions at the Site.

3 (d) On March 6, 1998, the United States filed a complaint against, *inter alia*, Mr. Propper
4 in order to recover its response costs incurred in connection with the Site. On May 1, 1998, the
5 United States amended its complaint to include an *in rem* action against the Property. The United
6 States has determined that Mr. Propper has no substantial assets other than the Property. The United
7 States and Mr. Propper have negotiated an agreement under which Mr. Propper has agreed to sell
8 the Property to the Settling Respondent for \$108,000 and that, at the time of closing, sixty percent
9 (60%) of the sales price would be paid to the United States as reimbursement of EPA's response
10 costs. In return, EPA agreed to provide this Agreement to facilitate the sale of the Property.

11 9. The Settling Respondent represents, and for the purposes of this Agreement EPA relies
12 on those representations, that Settling Respondent's involvement with the Property and the Site has
13 been limited to the following: The Settling Respondent first became interested in acquiring the
14 Property in early 1990. In connection with its pre-acquisition investigation of the Property, Settling
15 Respondent retained Goldberg-Zoino & Associates, Inc. to conduct a Preliminary Environmental Site
16 Evaluation ("PESE"). Goldberg-Zoino issued a PESE Report on June 19, 1998. Due to the findings
17 in the PESE Report, Settling Respondent then discontinued its interest and efforts to acquire the
18 Property. In early 1998, Settling Respondent again became interested in acquiring the Property when
19 it was contacted by the Office of Housing and Community Development of the City of Philadelphia
20 ("OHCD"). OHCD proposed that Settling Respondent acquire the Property for initial use by
21 Greensgrow, Inc. as a hydroponic lettuce farm, to serve as an experimental project to demonstrate

possible alternative uses of vacant urban land. Settling Respondent, in cooperation with OHCD, intends to continue the Greensgrow project for two years. At the conclusion of the Greensgrow project, Settling Respondent, in cooperation with OHCD, intends to construct 12-16 homes for sale to low and moderate income families under the Community Development Block Grant Fund program.

IV. PAYMENT

10. At the time of the closing, Settling Respondent shall deliver to the United States 60% of the sales price for the Property. The sales price shall be \$108,000. Payment shall be made by certified check or checks or cashier's check or checks made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number 03DJ, USAO File Number 1997V02292. Settling Respondent shall hand-deliver the check[s] to:

John J. Pease or his designee
Assistant United States Attorney
United States Attorney's Office
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
(215) 451-5340

Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

**V. ACCESS, NOTICE TO SUCCESSORS
IN INTEREST, AND USE RESTRICTIONS**

11. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees as follows:

(a) **Access.** EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et. seq. (“RCRA”), and any other applicable statute or regulation, including any amendments thereto.

(b) **Notice in Property Records.** Settling Respondent agrees that:

(1) Within thirty (30) days after the effective date of this Agreement, the Settling Respondent shall record a certified copy of this Agreement with the Recorder's Office (or Registry of Deeds or other appropriate office), Philadelphia County, Pennsylvania. Thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement. A copy of these documents should be sent to the persons listed in Section XV (Notices and Submissions).

(2) The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement.

1 (c) **Use Restrictions.** Soils on the Property, as well as on surrounding parcels, contain
2 lead in varying concentrations. The following restrictions shall be followed to minimize risks to
3 human health and the environment from lead-contaminated soils on the Property:

4 1. **Excavation.** No excavation of soils shall be conducted at the Property unless
5 effective measures are implemented that prevent the migration of soils and dusts from the
6 Property.

7 2. **Residential Development.** No residential units shall be constructed or placed on
8 the Property unless (a) lead contamination in soils on the Property to a depth of 24 inches from
9 the surface is reduced to 400 parts per million or below, (b) all hazardous substances excavated in
10 order to attain the cleanup level set forth herein are properly disposed in accordance with Federal
11 and State laws, and (c) EPA is provided with notice of no less than sixty (60) days prior to the
12 excavation of hazardous substances undertaken to attain the cleanup level set forth herein.

13 VI. **DUE CARE/COOPERATION**

14 12. The Settling Respondent shall exercise due care at the Site with respect to the
15 Existing Contamination and shall comply with all applicable local, State, and federal laws and
16 regulations. The Settling Respondent recognizes that the implementation of response actions at
17 the Site may interfere with the Settling Respondent's use of the Property, and may require closure
18 of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in
19 the implementation of response actions at the Site and further agrees not to interfere with such
20 response actions. EPA agrees, consistent with its responsibilities under applicable law, to use
21 reasonable efforts to minimize any interference with the Settling Respondent's operations by such

1 entry and response. In the event the Settling Respondent becomes aware of any action or
2 occurrence which causes or threatens a release of hazardous substances, pollutants or
3 contaminants at or from the Site that constitutes an emergency situation or may present an
4 immediate threat to public health or welfare or the environment, Settling Respondent shall
5 immediately take all appropriate action to prevent, abate, or minimize such release or threat of
6 release, and shall, in addition to complying with any applicable notification requirements under
7 Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such
8 release or threatened release.

11 **VII. CERTIFICATION**

12 13. By entering into this agreement, the Settling Respondent certifies that to the best of
13 its knowledge and belief it has fully and accurately disclosed to EPA all information known to
14 Settling Respondent and all information in the possession or control of its officers, directors,
15 employees, contractors, and agents which relates in any way to any Existing Contamination or any
16 past or potential future release of hazardous substances, pollutants or contaminants at or from the
17 Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the
18 best of its knowledge and belief it has not caused or contributed to a release or threat of release of
19 hazardous substances or pollutants or contaminants at the Site. If the United States determines
20 that information provided by Settling Respondent is not materially accurate and complete, the
21 Agreement, within the sole discretion of the United States, shall be null and void and the United

1 States reserves all rights it may have.

3 **VIII. UNITED STATES' COVENANT NOT TO SUE**

4 14. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment
5 of the amount specified in Section IV (Payment), the United States covenants not to sue or take
6 any other civil or administrative action against Settling Respondent for any and all civil liability for
7 injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of
8 CERCLA, 42 U.S.C. §§ 9606 or 9607(a), with respect to the Existing Contamination.

11 **IX. RESERVATION OF RIGHTS**

12 15. The covenant not to sue set forth in Section VIII above does not pertain to any
13 matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue).
14 The United States reserves and the Agreement is without prejudice to all rights against Settling
15 Respondent with respect to all other matters, including but not limited to, the following:

16 (a) claims based on a failure by Settling Respondent to meet a requirement of this
17 Agreement, including but not limited to Section IV (Payment), Section V (Access and Notice to
18 Successors in Interest), Section VI (Due Care/Cooperation), and Section XIV (Payment of
19 Costs);

20 (b) any liability resulting from past or future releases of hazardous substances, pollutants
21 or contaminants, at or from the Site caused or contributed to by Settling Respondent, its

1 successors, assignees, lessees or sublessees;

2 (c) any liability resulting from exacerbation by Settling Respondent, its successors,
3 assignees, lessees or sublessees, of Existing Contamination;

4 (d) any liability resulting from the release or threat of release of hazardous substances,
5 pollutants or contaminants, at the Site after the effective date of this Agreement, not within the
6 definition of Existing Contamination;

7 (e) criminal liability;

8 (f) liability for damages for injury to, destruction of, or loss of natural resources, and for
9 the costs of any natural resource damage assessment incurred by federal agencies other than EPA;
10 and

11 (g) liability for violations of local, State, or federal law or regulations.

12 16. With respect to any claim or cause of action asserted by the United States, the
13 Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part
14 thereof, is attributable solely to Existing Contamination.

15 17. Nothing in this Agreement is intended as a release or covenant not to sue for any
16 claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in
17 equity, which the United States may have against any person, firm, corporation, or other entity
18 not a party to this Agreement.

19 18. Nothing in this Agreement is intended to limit the right of EPA to undertake future
20 response actions at the Site or to seek to compel parties other than the Settling Respondent to
21 perform or pay for response actions at the Site. Nothing in this Agreement shall in any way

1 restrict or limit the nature or scope of response actions which may be taken or be required by
2 EPA in exercising its authority under federal law. Settling Respondent acknowledges that it is
3 purchasing property where response actions may be required.
4

5 **X. SETTLING RESPONDENT'S COVENANT NOT TO SUE**

6 19. In consideration of the United States' Covenant Not To Sue in Section VIII of this
7 Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or
8 causes of action against the United States, its authorized officers, employees, or representatives
9 with respect to the Site or this Agreement, including but not limited to, any direct or indirect
10 claims for reimbursement from the Hazardous Substance Superfund established pursuant to the
11 Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113,
12 or any other provision of law, any claim against the United States, including any department,
13 agency or instrumentality of the United States under Sections 107 or 113 of CERCLA related to
14 the Site, or any claims arising out of response activities at the Site, including claims based on
15 EPA's oversight of such activities or approval of plans for such activities.

16 20. The Settling Respondent reserves, and this Agreement is without prejudice to, actions
17 against the United States based on negligent actions taken directly by the United States, not
18 including oversight or approval of the Settling Respondent's plans or activities, that are brought
19 pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign
20 immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to
21 constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C.

1 § 9611, or 40 C.F.R. § 300.700(d).

3 **XI. PARTIES BOUND/TRANSFER OF COVENANT**

4 21. This Agreement shall apply to and be binding upon the United States and shall apply
5 to and be binding on the Settling Respondent, its officers, directors, employees, and agents. The
6 undersigned representative of Settling Respondent certifies that he or she is fully authorized to
7 enter into the terms and conditions of this Agreement and to legally bind such Settling
8 Respondent.

9 22. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and
10 obligations conferred upon Settling Respondent under this Agreement may be assigned or
11 transferred to any person with the prior written consent of EPA in its sole discretion.

12 23. The Settling Respondent agrees to pay the reasonable costs incurred by EPA to
13 review any subsequent requests for consent to assign or transfer the benefits conferred by this
14 Agreement.

15 24. In the event of an assignment or transfer of the Property or an assignment or transfer
16 of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms
17 and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor
18 or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover,
19 prior to or simultaneous with any assignment or transfer of the Property, the assignee or
20 transferee must consent in writing to be bound by the terms of this Agreement including but not
21 limited to the certification requirement in Section VII of this Agreement in order for the Covenant

1 Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section
2 VIII shall not be effective with respect to any assignees or transferees who fail to provide such
3 written consent to EPA.
4

5 **XII. DISCLAIMER**

6 25. This Agreement in no way constitutes a finding by EPA as to the risks to human
7 health and the environment which may be posed by contamination at the Property or the Site nor
8 constitutes any representation by EPA that the Property or the Site is fit for any particular
9 purpose.
10

11 **XIII. DOCUMENT RETENTION**

12 26. The Settling Respondent agrees to retain and make available to EPA all business and
13 operating records, contracts, site studies and investigations, and documents relating to operations
14 at the Property for at least ten (10) years following the effective date of this Agreement unless
15 otherwise agreed to in writing by the Settling Respondent and EPA. At the end of ten years, the
16 Settling Respondent shall notify EPA of the location of such documents and shall provide EPA
17 with an opportunity to copy any documents at the expense of EPA.
18
19

20 **XIV. PAYMENT OF COSTS**

21 27. (a) If the Settling Respondent fails to comply with the terms of this Agreement,

1 including, but not limited to, the provisions of Section IV (Payment) of this Agreement, it shall be
2 liable for all litigation and other enforcement costs incurred by the United States to enforce this
3 Agreement or otherwise obtain compliance.

4 (b) The Settling Respondent agrees to pay the costs incurred by EPA to review plans
5 for excavation, regrading, construction, and other activities submitted by Settling Respondent
6 pursuant to this Agreement. EPA will submit to Settling Respondent periodic accounting(s) of
7 such costs, including indirect costs, incurred by EPA, its employees, agents, contractors,
8 consultants, and other authorized and/or designated representatives in connection with EPA's
9 review of such plans. Settling Respondent shall, within thirty (30) calendar days of receipt of the
10 accounting, remit a check for the amount of those costs made payable to the "Hazardous
11 Substance Superfund." Interest at a rate established pursuant to section 107(a) of CERCLA, 42
12 U.S.C. § 9607(a) shall begin to accrue on the unpaid balance from the day after the expiration of
13 the thirty-day period notwithstanding any dispute or an objection to any portion of the costs.
14 The Settling Respondent shall make all payments required by this Agreement in the form of a
15 certified check or checks made payable to the "EPA Hazardous Substance Superfund." Each
16 such check shall contain Settling Respondent's name and address and the following information:

17 "EPA Docket No. III-99-006-DC"
18 "Site/Spill ID#03DJ"
19 "DOJ case number 90-11-2-1330"

20
21 Payment shall be forwarded to:

22 U.S. Environmental Protection Agency
23 Region III
24 Superfund Accounting
25 Box 360515

Pittsburgh, PA 15251-6515

Notice of payment and a copy of the check shall be sent to those persons listed in Section XV (Notices and Submissions) and to the EPA Region III Comptroller's Office at the following address:

Office of the Regional Comptroller(3PM30)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

and to the Docket Clerk at the following address:

Docket Clerk (3RC00)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

XV. NOTICES AND SUBMISSIONS

28. All notices and submissions provided pursuant to this Agreement shall be forwarded to:

Christine Wagner (3HW31)
On Scene Coordinator
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

and

Andrew S. Goldman (3RC21)
Sr. Assistant Regional Counsel

U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

XVI. EFFECTIVE DATE

29. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA continues to consent to this Agreement following review of and response to any public comments received.

XVII. TERMINATION

30. If Settling Respondent or EPA believes that any or all of the obligations under Section V (Access and Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, such party may request in writing that the other party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XVIII. CONTRIBUTION PROTECTION

31. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as

1 provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed in this
2 Agreement. The matters addressed in this Agreement are all response actions taken or to be
3 taken and response costs incurred or to be incurred by the United States or any other person for
4 the Site with respect to the Existing Contamination.

5 32. The Settling Respondent agrees that with respect to any suit or claim for contribution
6 brought by it for matters related to this Agreement it will notify the United States in writing no
7 later than sixty (60) days prior to the initiation of such suit or claim.

8 33. The Settling Respondent also agrees that with respect to any suit or claim for
9 contribution brought against it for matters related to this Agreement it will notify in writing the
10 United States within ten (10) days of service of the complaint on it.

11 12 **XIX. EXHIBITS**

13 34. Exhibit 1 shall mean a deed of the Property which is the subject of this Agreement.

14 35. Exhibit 2 shall mean the map depicting the Site.

15 16 **XX. PUBLIC COMMENT**

17 36. This Agreement shall be subject to a thirty (30) day public comment period, after
18 which the United States may modify or withdraw its consent to this Agreement if comments
19 received disclose facts or considerations which indicate that this Agreement is inappropriate,
20 improper, or inadequate.

XXI. REMOVAL OF LIEN

37. Subject to the Reservation of Rights in Section IX of this Agreement, EPA agrees to remove any lien it may have on the Property under section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at the Property.

IT IS SO AGREED:

FOR EPA:

W. Michael McCabe
Regional Administrator
U.S. Environmental Protection Agency
Region III

Date

Andrew S. Goldman
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III

Date

**APPROVAL BY THE UNITED STATES
DEPARTMENT OF JUSTICE:**

1 _____
2 Lois J. Schiffer
3 Assistant Attorney General
4 Environment and Natural Resources Division
5 U.S. Department of Justice
6
7
8
9

Date

10
11 **FOR THE SETTTLING RESPONDENT:**
12
13
14
15

16 _____
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19 Name: _____
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Date

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22 Position/Title: _____
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